Filed 6/23/09 P. v. Fukamoto CA2/4

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>HIROFUMI FUKAMOTO,<br><br>Defendant and Appellant. | B210516<br><br>(Los Angeles County<br>Super. Ct. No. YA068243) |

APPEAL from an order of the Superior Court of Los Angeles County, Eric C. Taylor, Judge. Affirmed.

Law Offices of George L. Steele and George L. Steele for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan Sullivan Pithey and Theresa A. Patterson, Deputy Attorneys General, for Plaintiff and Respondent.

Following appellant's plea of guilty in the underlying action, the court imposed a sentence that failed to include victim restitution or an order finding compelling reasons for declining to order such restitution. Appellant subsequently obtained a dismissal of the action pursuant to Penal Code section 1203.4.[1] At the request of an alleged victim and the prosecutor, the trial court set aside the dismissal for the limited purpose of reopening the case to conduct a hearing on victim restitution. On appeal, appellant challenges the court's jurisdiction to do so.

We hold that where a court improperly fails to order victim restitution or find compelling reasons for not doing so, the court retains jurisdiction to reopen the case for the limited purpose of addressing victim restitution, notwithstanding the dismissal of the action under section 1203.4. Accordingly, we affirm.

## RELEVANT FACTUAL AND PROCEDURAL HISTORY

In June 2007, appellant Hirofumi Fukamoto was arrested and charged with grand theft by embezzlement (§ 487, subd. (a)). At the preliminary hearing, the investigating detective testified that Hiroki Nanahoshi, a vehicle importer, hired appellant to bring five foreign sport cars into compliance with domestic vehicle standards, and that appellant failed to return the cars to Nanahoshi. On October 12, 2007, an information was filed charging appellant with five counts of grand theft by embezzlement from Nanahoshi and others. Appellant pleaded not guilty.

At a hearing on April 23, 2008, appellant appeared with his counsel, George Steele. Deputy District Attorney Alexander M. Karkanen requested that the information be amended to include a count of misdemeanor vehicle tampering

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[1] Unless otherwise indicated, all further statutory references are to the Penal Code.

(Veh. Code, § 10852). Karkanen explained that the amendment was intended to facilitate a plea agreement. Under the proposed agreement, appellant would enter a plea of no contest to vehicle tampering, the remaining charges would be dismissed, and appellant would be placed on probation for three years and required to pay $2,500 in restitution costs to the County of Los Angeles. Regarding victim restitution, Karkanen stated, "[T]he parties are already engaged in a civil lawsuit so I think that that would be the most expeditious way to handle that." The trial court ordered the information amended as requested, and appellant pled no contest to the new charge. The trial court made no reference to victim restitution on the record.

On May 5, 2008, the parties appeared for the sentencing hearing. Karkanen informed the trial court: "[Appellant] plead[ed]. We were going to do probation, and I had no objection to early termination as soon as he paid off all his fees . . . . We were going to dismiss the remaining counts, and once he made all his payments, I had no objection to a termination and dismissal." Steele added: "Termination and expungement." After an interval during which appellant paid $2,500 in restitution costs to the County of Los Angeles and court fines and fees, the trial court dismissed the grand theft counts; in addition, it granted appellant's motions for termination of probation (§ 1203.3), and for expungement of his conviction for vehicle tampering and dismissal of the accusations against him ( § 1203.4).

On June 17, 2008, Nanahoshi filed a motion to vacate the dismissal for the purpose of reopening the issue of victim restitution, contending that no "viable" order regarding his right to restitution had been entered prior to the dismissal. The motion alleged that prior to the dismissal, no one informed Nanahoshi of the status or anticipated disposition of the case; that Nanahoshi was not, in fact, seeking

restitution from appellant in a civil action when the trial court approved the plea bargain; and that appellant and Steele secured the dismissal through extrinsic fraud, by misleading Karkanen into believing that such an action existed. According to the motion, the only civil action between appellant and Nanahoshi during the underlying criminal case was a suit by appellant against Nanahoshi for assault, in which no cross-complaint was filed.

Appellant objected to the motion on several grounds, including that the dismissal denied the trial court subject matter jurisdiction and personal jurisdiction over appellant. Appellant's opposition also argued that appellant and Steele made no misrepresentations to Karkanen, and suggested that Karkanen may have misunderstood some remarks by Steele regarding a civil action between appellant and a different victim of appellant's purported grand theft.

Appellant was not present at the evidentiary hearing on Nanahoshi's motion, which occurred on July 28, 2008. Steele made a special appearance on appellant's behalf. The sole witness at the hearing was Karkanen, who testified that he negotiated the plea agreement with Steele. According to Karkanen, his discussions with Steele led him to believe that a civil action encompassing restitution existed between Nanahoshi and appellant, although he could not recall the details of Steele's remarks. Karkanen further testified that he did not notify Nanahoshi about the pending disposition of the criminal case because Nanahoshi was outside the United States.

Following the presentation of evidence, the trial court ruled that it would vacate the dismissal only upon a motion from the People. At Karkanen's request, the trial court ordered that the dismissal be set aside for purposes of determining Nanahoshi's right to restitution. This appeal followed.

## DISCUSSION

Appellant contends that the trial court erred in setting aside the dismissal. For the reasons explained below, we disagree.

### A. *Victim Restitution*

The key issue before us concerns whether the trial court properly acted to protect Nanahoshi's right to victim restitution after a dismissal pursuant to section 1203.4. As our Supreme Court has explained: "In 1982, California voters passed Proposition 8, also known as The Victims' Bill of Rights. . . . Proposition 8 established the right of crime victims to receive restitution directly 'from the persons convicted of the crimes for losses they suffer.' (Cal. Const., art. I, § 28, subd. (b).) The initiative added article I, section 28, subdivision (b) to the California Constitution: 'It is the unequivocal intention of the People of the State of California that all persons who suffer losses as a result of criminal activity shall have the right to restitution from the persons convicted of the crimes for losses they suffer. [¶] Restitution shall be ordered from the convicted persons in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss, unless compelling and extraordinary reasons exist to the contrary.'" (*People v. Giordano* (2007) 42 Cal.4th 644, 652.)

As this constitutional provision is not self-executing, the Legislature has enacted implementing legislation. (*People v. Giordano*, *supra*, 42 Cal.4th at p. 652.) Section 1202.4 authorizes the imposition of restitution fines, which support a fund that compensates victims, and restitution payments to victims. (§ 1202.4, subds. (e), (f).) Under subdivision (f) of section 1202.4, the trial court is obliged to require the defendant to pay full restitution to victims of a crime "unless it finds compelling and extraordinary reasons for not doing so, and states

them on the record."[2] Under subdivision (m) of section 1202.4, the trial court must incorporate any such order in the defendant's conditions of probation.[3] In view of these statutory requirements, "[a] sentence without an award of victim restitution is invalid." (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1225; *People v. Bernal* (2002) 101 Cal.App.4th 155, 164-165; *People v. Rowland* (1997) 51 Cal.App.4th 1745, 1750-1752.)

Under the statutory scheme, the prosecutor, the victim, and the trial court on its own motion may challenge a sentence that lacks a victim restitution order (*People v. Moreno* (2003) 108 Cal.App.4th 1, 10 (*Moreno*); § 1202.46). In addition, the Legislature has provided that victims are entitled to notice of all sentencing hearings, including those implicating victim restitution (§ 1191.1). As the court explained in *Melissa J. v. Superior Court* (1987) 190 Cal.App.3d 476, 478, although the victim is not a party to the criminal action, "[p]roper determination of restitution rights cannot take place without notice and an opportunity for the victim to be heard. Thus, as to restitution, the notice and right to appear requirements are mandatory. If the requirements are not satisfied, the victim may challenge a ruling regarding restitution." (See also *People v. Green*

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[2] Subdivision (f) of section 1202.4 provides in pertinent part: "In every case in which a victim has suffered economic loss as a result of the defendant's conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court. If the amount of loss cannot be ascertained at the time of sentencing, the restitution order shall include a provision that the amount shall be determined at the direction of the court. The court shall order full restitution unless it finds compelling and extraordinary reasons for not doing so, and states them on the record."

(2004) 125 Cal.App.4th 360, 378 ["If the trial court makes an order concerning restitution without notice to a victim, the victim, if aggrieved, is entitled to move to vacate the order."].)

B. *Propriety of Setting Aside Dismissal*

Here, appellant does not dispute that Nanahoshi received no notice of the impending disposition of the case through a plea agreement, and that the trial court, in accepting the plea agreement, made no finding of "compelling and extraordinary reasons" on the record for omitting a victim restitution order (§ 1202.4, subd. (f)). Appellant contends only that the trial court improperly set aside the dismissal under section 1203.4 for purposes of determining Nanahoshi's right to restitution.

Subdivision (a) of section 1203.4 provides in pertinent part: "In any case in which a defendant has fulfilled the conditions of probation for the entire period of probation . . . , the defendant shall . . . be permitted by the court to withdraw his or her plea of guilty or plea of nolo contendere and enter a plea of not guilty . . . ; and . . . the court shall thereupon dismiss the accusations or information against the defendant . . . ." The provision further states that upon the change of plea and dismissal, the defendant "shall thereafter be released from all penalties and disabilities resulting from the offense of which he or she has been convicted."[4]

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[3] Subdivision (m) of section 1202.4 provides in pertinent part: "In every case in which the defendant is granted probation, the court shall make the payment of restitution fines and orders imposed pursuant to this section a condition of probation."

[4] Section 1203.4 provides in pertinent part: "(a) In any case in which a defendant has fulfilled the conditions of probation for the entire period of probation, or has been discharged prior to the termination of the period of probation, or in any other case in which a court, in its discretion and the interests of justice, determines that a defendant
*(Fn. continued on next page.)*

should be granted the relief available under this section, the defendant shall, at any time after the termination of the period of probation, if he or she is not then serving a sentence for any offense, on probation for any offense, or charged with the commission of any offense, be permitted by the court to withdraw his or her plea of guilty or plea of nolo contendere and enter a plea of not guilty; or, if he or she has been convicted after a plea of not guilty, the court shall set aside the verdict of guilty; and, in either case, the court shall thereupon dismiss the accusations or information against the defendant and except as noted below, he or she shall thereafter be released from all penalties and disabilities resulting from the offense of which he or she has been convicted, except as provided in Section 13555 of the Vehicle Code. The probationer shall be informed, in his or her probation papers, of this right and privilege and his or her right, if any, to petition for a certificate of rehabilitation and pardon. The probationer may make the application and change of plea in person or by attorney, or by the probation officer authorized in writing. However, in any subsequent prosecution of the defendant for any other offense, the prior conviction may be pleaded and proved and shall have the same effect as if probation had not been granted or the accusation or information dismissed. The order shall state, and the probationer shall be informed, that the order does not relieve him or her of the obligation to disclose the conviction in response to any direct question contained in any questionnaire or application for public office, for licensure by any state or local agency, or for contracting with the California State Lottery.

Dismissal of an accusation or information pursuant to this section does not permit a person to own, possess, or have in his or her custody or control any firearm or prevent his or her conviction under Section 12021.

Dismissal of an accusation or information underlying a conviction pursuant to this section does not permit a person prohibited from holding public office as a result of that conviction to hold public office.

(b) Subdivision (a) of this section does not apply to any misdemeanor that is within the provisions of subdivision (b) of Section 42001 of the Vehicle Code, to any violation of subdivision (c) of Section 286, Section 288, subdivision (c) of Section 288a, Section 288.5, or subdivision (j) of Section 289, any felony conviction pursuant to subdivision (d) of Section 261.5, or to any infraction.

(c)(1) Except as provided in paragraph (2), subdivision (a) does not apply to a person who receives a notice to appear or is otherwise charged with a violation of an offense described in subdivisions (a) to (e), inclusive, of Section 12810 of the Vehicle Code. . . .”

Appellant's principal contention is that the dismissal precludes a victim restitution order because it expunged his conviction and terminated the trial court's subject matter jurisdiction and personal jurisdiction over him. As explained below, we conclude that notwithstanding the dismissal, (1) appellant remains liable for victim restitution, and (2) the trial court retained the jurisdiction necessary to impose a victim restitution order.

We begin with appellant's continuing liability for victim restitution. Generally, "'section 1203.4 does not, properly speaking, "expunge" the prior conviction. The statute does not purport to render the conviction a legal nullity. Instead, it provides that, except as elsewhere stated, the defendant is "released from all penalties and disabilities resulting from the offense." The limitations on this relief are numerous and substantial . . . . '" (*People v. Vasquez* (2001) 25 Cal.4th 1225, 1230 (*Vasquez*), quoting *People v. Frawley* (2000) 82 Cal.App.4th 784, 791 (*Frawley*).)

As our Supreme Court has explained, these limitations hinge on "a distinction between penalties imposed . . . as further punishment for the crime, as to which vacation under [] section 1203.4 generally affords relief, and nonpenal restrictions adopted for the protection of public safety and welfare." (*Vasquez*, *supra*, 25 Cal.4th at pp. 1230-1231.) Thus, California courts have consistently upheld the denial of professional licenses due to a conviction following dismissals under section 1203.4. (*Adams v. County of Sacramento* (1991) 235 Cal.App.3d 872, 880 [discussing cases].) The rationale underlying these decisions is that so-called expungement frees the convicted defendant from penalties and disabilities "of a criminal or like nature," but does not "obliterate *the fact* that the defendant has been 'finally adjudged guilty of a crime'" for purposes of protecting public welfare. (*Id*. at pp. 877-881, quoting *In re Phillips* (1941) 17 Cal.2d 55, 61.)

Moreover, numerous statutes impose continuing liabilities upon persons who have obtained a dismissal pursuant to section 1203.4. (*Frawley*, *supra*, 82 Cal.App.4th at pp. 791-792.) Section 1203.4 itself places several limitations on the relief it offers, including that "in any subsequent prosecution of the defendant for any other offense, the prior conviction may be pleaded and proved and shall have the same effect as if probation had not been granted or the accusation or information dismissed." As the court remarked in *Frawley*, "[t]his provision alone precludes any notion that the term 'expungement' accurately describes the relief allowed by the statute." (*Frawley*, *supra*, 82 Cal.App.4th at p. 792.) Other statutes expressly provide that a dismissal under section 1203.4 does not limit the consequences of a conviction. (E.g., Evid. Code, § 788, subd. (c) [defendant may be impeached with prior conviction, notwithstanding dismissal under section 1203.4]; Veh. Code, § 13555 [dismissal under section 1203.4 does not affect revocation or suspension of driver's license due to conviction]; see *Frawley*, *supra*, 82 Cal.App.4th at p. 792 [discussing statutes].)

A statute may impose a continuing liability upon an individual who has obtained a dismissal under section 1203.4, even though the statute does not contain an express provision to this effect. In *Vasquez*, the defendant suffered a conviction in Texas for sexually abusing a child, and obtained a dismissal of the action under a Texas statute that closely resembled section1203.4. (*Vasquez*, *supra*, 25 Cal.4th at 1227.) In California, he was civilly committed pursuant to the Sexually Violent Predators Act (SVPA) (Welf. & Inst. Code, § 6600 et seq.) on the basis of his convictions, including the Texas conviction. (*Vasquez*, *supra*, 25 Cal.4th at pp. 1227-1228.) Our Supreme Court affirmed the judgment, concluding that although the SVPA does not expressly state that convictions set aside under section 1203.4 provide a basis for commitment, the defendant's commitment

properly relied on the Texas conviction, as the SVPA is intended to protect the public, rather than to impose additional punishment. (*Vasquez, supra*, 25 Cal.4th at pp. 1230-1234.)

We reach a similar conclusion here. Although the constitutional provision and statutory scheme governing victim restitution do not refer to section 1203.4, the constitutional provision is unequivocal in its declaration that absent extraordinary circumstances, "all persons who suffer losses as a result of criminal activity shall have the right to seek and secure restitution . . . *regardless* of the sentence or *disposition* imposed . . . ." (Cal. Const., art. I, § 28, subd. (a), italics added.) This language, on its face, discloses the voters' intent to establish a continuing right to restitution following the disposition of an action. Although a dismissal under section 1203.4 sets aside a defendant's conviction for some purposes, the dismissal does not itself extinguish the facts underlying the conviction, including the victims' injuries (if any), and thus the defendant is properly held liable for such injuries.

Moreover, in *People v. Harvest* (2000) 84 Cal.App.4th 641, 646-650 (*Harvest*), the court held that victim restitution is not punishment within the meaning of the double jeopardy provision of the California Constitution (Cal. Const., art. I., § 15), reasoning that such restitution is fundamentally compensatory in nature, and amounts to a civil remedy, rather than a criminal penalty.[5] (*Harvest, supra*, 84 Cal.App.4th at pp. 646-650.) As victim restitution is not punitive and functions to enhance public welfare, defendants must be regarded as under a

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[5] In so concluding, the court in *Harvest* distinguished victim restitution from restitution *fines*, which are punitive in nature (*People v. Hanson* (2000) 23 Cal.4th 355, 362). (*Harvest, supra*, 84 Cal.App.4th at pp. 646-647.)

continuing obligation to make restitution, even though their convictions have been set aside under section 1203.4.

We also conclude that the trial court had jurisdiction to impose a victim restitution order after the action was dismissed. Under the statutory scheme governing victim restitution, the Legislature has authorized the trial court to modify a sentence from which a victim restitution order has been improperly omitted. Section 1202.46 provides that "[n]otwithstanding section 1170," which governs determinate sentencing, "when the economic losses of a victim cannot be ascertained at the time of sentencing pursuant to subdivision (f) of [s]ection 1202.4, the court shall retain jurisdiction over a person subject to a restitution order for purposes of imposing or modifying restitution until such time as the losses may be determined. Nothing in this section shall be construed as prohibiting a victim, the district attorney, or a court on its own motion from requesting correction, at any time, of a sentence when the sentence is invalid due to the omission of a restitution order . . . without a finding of compelling and extraordinary reasons pursuant to [s]ection 1202.4."

Courts have held that this provision grants the trial court jurisdiction to modify a sentence to include a restitution order after the sentence has been affirmed on appeal, or has been served by the defendant. In *Moreno*, the trial court sentenced the defendant to a term of 52 years to life, but failed to order victim restitution, and did not expressly retain jurisdiction over the matter. (*Moreno*, *supra*, 108 Cal.App.4th at pp. 3-4.) After the defendant unsuccessfully challenged his sentence on appeal, the trial court imposed a restitution order. (*Ibid*.) In affirming the order, the appellate court explained: "[N]otwithstanding a trial court's failure to retain jurisdiction to impose or modify a restitution order, the second part of section 1202.46 permits the prosecutor, *at any time*, to request

correction of a sentence that is *invalid* because . . . the court at the initial sentencing had neither ordered restitution nor found 'compelling and extraordinary reasons' for ordering less than full restitution. The victim too may make such a request, or the trial court may act on its own motion. It follows that the court is not barred from correcting the invalid sentence simply because the prosecutor failed to object when it was imposed. An invalid or unauthorized sentence is subject to correction whenever it comes to the court's attention. [Citations.]" (*Moreno*, *supra*, 108 Cal.App.4th at p. 10.)

In *People v. Bufford* (2007) 146 Cal.App.4th 966, 968-969, the trial court sentenced the defendant to four years in prison and ordered her to pay victim restitution, but the hearing to determine the amount of restitution was repeatedly continued (due to an appeal and other intervening events), and was finally set after the defendant had completed her sentence. In affirming the order setting the hearing, the appellate court held that section 1202.46 gave the trial court jurisdiction to impose a restitution order after the defendant had fully served her sentence. (*People v. Bufford*, *supra,* 146 Cal.App.4th at p. 970.)

In our view, the court below also had the jurisdiction necessary to correct a sentence to include a victim restitution order after a dismissal pursuant to section 1203.4. As we have explained, the constitutional provision governing victim restitution states that the victim has a right to restitution "*regardless* of the sentence or *disposition* imposed . . . ." (Cal. Const., art. I, § 28, subd. (b), italics added.) Moreover, section 1202.46 states that the trial court may "retain jurisdiction over a person" to impose a victim restitution order, and that the victim, the district attorney, or a court on its own motion may request such an order "at any time." Accordingly, the voters, in adopting Proposition 8, and the Legislature, in enacting section 1202.46, manifested an intent to accord the trial court

continuing jurisdiction to impose a victim restitution order, regardless of the disposition of the case. As the trial court had subject matter jurisdiction and personal jurisdiction over appellant prior to the dismissal under section 1203.4, and Nanahoshi and the prosecution promptly sought to correct appellant's sentence, we conclude that the trial court retained jurisdiction to do so.

Appellant's reliance on *People v. Kirkpatrick* (1991) 1 Cal.App.4th 538 is misplaced. There, the defendant falsely informed the trial court that he had been awarded the Silver Star, a high military distinction, and the trial court relied on this misrepresentation in imposing the middle term for the defendant's offense. (*Id.* at pp. 541-542.) After the sentence had been entered in the minutes of the court and the defendant had noticed an appeal, the trial court discovered the falsehood and tried to resentence the defendant. (*Ibid*.) The appellate court concluded that the entry of the original sentence in the court minutes eliminated the trial court's authority to modify the sentence, and that the notice of appeal removed the trial court's jurisdiction over the matter. (*Id*. at pp. 543-545.) Here, unlike *Kirkpatrick*, no notice of appeal had been filed when the trial court set aside the dismissal; moreover, the omission of victim restitution order rendered appellant's sentence *invalid*, and thus "subject to correction when[] it [came] to the court's attention" (*Moreno, supra,* 108 Cal.App.4th at p. 10; see 6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Judgment, § 176, pp. 205-206).[6]

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[6] Appellant also suggests that the dismissal deprived the trial court of jurisdiction pursuant to sections 1384 and 1387. However, these statutes, by their terms, appear to be applicable to the dismissals identified in title 18, chapter 8 of the Penal Code (section 1381 et seq.), and thus do not govern a dismissal under section 1203.4. Moreover, to the extent they are statutes of general application, they are displaced by the more specific
*(Fn. continued on next page.)*

Pointing to *People v. Walker* (1991) 54 Cal.3d 1013 (*Walker*), appellant contends that he is entitled under section 1192.5 to rely on the terms of the plea bargain. He is mistaken. Section 1192.5 provides that with specified exceptions, "[w]here [a] plea is accepted by the prosecuting attorney in open court and is approved by the court, the defendant . . . cannot be sentenced on the plea to a punishment more severe than that specified in the plea and the court may not proceed as to the plea other than as specified in the plea." In *Walker*, the defendant entered into a plea bargain whose terms did not include a restitution fine, but the trial court imposed a $5,000 restitution fine in sentencing the defendant. (*Walker*, *supra*, 54 Cal.3d at p. 1019.) The Supreme Court held that considerations of due process precluded the imposition of the fine, with the exception of a statutorily mandated minimum fine of $100, which the court characterized as "not . . . 'significant'." (*Walker*, *supra*, 54 Cal.3d at pp. 1024-1031.)

Here, we are concerned with victim restitution, not a restitution fine, and *Walker* is thus inapposite. More to the point is *People v. Brown*, *supra*, 147 Cal.App.4th 1213, where the defendant accepted a plea agreement whose terms did not include victim restitution, but the trial court ordered the defendant to pay approximately $35,000 in victim restitution. (*Id*. at pp. 1213, 1217-1219.) On appeal, the defendant asserted that she was entitled to rely on the plea agreement. (*Id*. at p. 1219). In rejecting this contention, the appellate court determined that the imposition of victim restitution, though not punishment for purposes of double jeopardy, provided grounds for relief under section 1192.5. (*People v. Brown*,

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provisions in the California Constitution and sections 1202.46. (*San Francisco Taxpayers Assn. v. Board of Supervisors* (1992) 2 Cal.4th 571, 577.)

*supra*, 147 Cal.App.4th at pp. 1221-1224.) The court nonetheless held that the defendant was not entitled to "specific performance" of the plea agreement, as victim restitution is mandated by the California Constitution, and as such, "may not be bargained away by the People." (*People v. Brown*, *supra*, 147 Cal.App.4th at pp. 1224-1226.) The defendant's sole remedy under section 1192.5, the court concluded, was to withdraw her plea. (*People v. Brown*, at pp. 1226-1228.) In view of *Brown*, appellant is not entitled to rely on the terms of his plea agreement.[7] In sum, the trial court properly set aside the dismissal for the limited purpose of determining Nanahoshi's right to victim restitution.

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[7] It is unnecessary for us to address appellant's remaining contentions, with the exception of his contention that the imposition of victim restitution contravenes the double jeopardy clause of the Fifth Amendment of the United States Constitution. This contention fails for two reasons. First, when, as here, the trial court imposed an unauthorized sentence due to the omission of a victim restitution order, the trial court may correct the omission, notwithstanding double jeopardy principles. (*Moreno, supra*, 108 Cal.App.4th at pp. 10-11.) Second, as we have explained, the court in *Harvest* rejected the analogous contention regarding the double jeopardy clause of the California Constitution. (*Harvest, supra*, 84 Cal.App.4th at pp. 646-650.) Because the *Harvest* court relied primarily on federal authority interpreting the double jeopardy clause of the federal Constitution, its conclusion is also dispositive of appellant's contention. (*Harvest,* at pp. 649-650 & fn. 1.)

## DISPOSITION

The order setting aside the dismissal for purposes of determining victim restitution is affirmed.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.